The Supreme Court of the United States.

OCTOBER TERM, 1902.

NO. 103.

THE BOSTON & MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY,
Appellant,

vs.

THE MONTANA ORE PURCHASING COMPANY, F. AUGUSTUS HEINZE AND ARTHUR P. HEINZE,
Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, NINTH CIRCUIT, DISTRICT OF MONTANA.

BRIEF AND ARGUMENT FOR APPELLEES.

I.

STATEMENT.

The appellant, in its statement, has included many things entirely foreign to this appeal—matters which, if they exist at all, are not brought be-

fore this Court, and cannot be considered by it on this appeal. We do not conceive any proper purpose for the appellant's counsel setting them forth, or making a contention regarding them, or attempting to draw inferences from them. They are disposed of by the statement that they do not exist in this case and have no place before the Court. This Court can only know, from the proper record presented to it, what has taken place in the case, and what, if any, question of right is presented by the appeal. We therefore dismiss all references made by appellant's counsel to what they claim was the position and argument of appellees' counsel at one time before the Circuit Court or the United States Circuit Court of Appeals, as being unworthy of any further notice.

It might have occurred to counsel who prepared the brief for appellant that they were not in anywise discharging their duty towards this Court by a reference to some matters claimed by them to have taken place or existed, but, since it did not, we beg to state, without admitting that any such matters as they refer to ever had any existence or are true, that it is a rule so thoroughly well established as being no longer open to discussion that parties cannot, either by their conduct or consent, give jurisdiction to a Circuit Court of the United States in a case where otherwise no such jurisdiction existed.

Counsel for appellant have also misstated the

case. A true statement with reference to the position of the appellees before the Circuit Court and the United States Circuit Court of Appeals would have disclosed that, upon the appearance of appellees herein to the original bill of complaint, they filed a demurrer thereto, upon the following grounds:

First. That the Court was without any jurisdiction to hear or determine the matter, for the reason that it appeared from the bill of complaint that there was no federal question involved herein.

Second. That the complainant had not by said bill made or stated such a case as did or ought to entitle it to any relief against the defendants.

This demurrer was overruled by the Circuit Court, and was included in the record when the case was presented to the United States Circuit Court of Appeals, and before it when it rendered its judgment and decision in this case (which is reported in *85 Federal Reporter, page 867*).

Appellant seeks to make it appear that after said decision by the United States Circuit Court of Appeals an amended bill of complaint was filed in the Circuit Court, in accordance with the suggestion of the United States Circuit Court of Appeals, and that it was upon said amended complaint that the appellees applied to the Circuit Court to dismiss the action. (This is stated on pages 9 and 10 of appellant's brief.) What appellant expected to gain by such a statement we do not know. The

fact is that, upon said amended complaint being filed, the appellees herein filed their answer thereto, and then made a motion, based upon the complaint and answer, to the Circuit Court to dismiss the suit. This was overruled, and, upon a hearing had, the Circuit Court granted an injunction against the defendants in the case, who thereupon took an appeal to the United States Circuit Court of Appeals, presenting to it the amended complaint and answer and all matters which had taken place in the Circuit Court upon said application for an injunction, together with the order of injunction entered by the Circuit Court. The case as thus presented came on for hearing before the United States Circuit Court of Appeals. The appellees herein, who were the appellants in that cause, contended that the amended bill of complaint did not show any jurisdiction in the Circuit Court, and that if it could be construed to have shown any such jurisdiction, the jurisdiction was defeated by the matters set for in the answer. The Court, after full argument, rendered its opinion and judgment in the matter, holding that the Circuit Court had no jurisdiction, and ordering the suit dismissed. *(Montana Ore Purchasing Co. et al. vs. Boston & Montana Consolidated Copper and Silver Mining Co., 93 Fed. Rep. 274.)*

The mandate was filed in the Circuit Court, but is not included in the printed record herein. Upon this mandate, presented by appellees herein, the

Circuit Court made and entered its decree, dismissing the cause in conformity therewith. This appears from the decree itself. (Record, page 34.) This is, therefore, not the decree of the Circuit Court, but simply the recognition of the mandate from the United States Circuit Court of Appeals, which had the effect, in itself, of dismissing the cause, and the action of the Circuit Court in conforming to this mandate was simply ministerial. It did not call for the exercise of any judicial determination or authority.

We have, then, in the case an attempted appeal, not from any judgment or decree of the United States Circuit Court, but from the decree of the United States Circuit Court of Appeals. There can, it seems, be no question but that the appellant had a right to appeal from the decree of the United States Circuit Court of Appeals at any time within one year after the rendition thereof, but no such appeal was prosecuted, and this appeal cannot be maintained therefrom.

With this statement of the case, which is in accord with the facts, we believe there will be no difficulty in this Court arriving at a determination to dismiss the appeal.

II.

THE MOTION TO DISMISS THE APPEAL.

ARGUMENT AND AUTHORITIES.

The appellees have filed herein their motion to dismiss the appeal on the following grounds:

First. Because the appeal is not taken from a final judgment of the Circuit Court, Ninth Circuit, District of Montana.

Second. Because by this appeal it is sought to review the decree of the United States Circuit Court of Appeals, Ninth Circuit.

Third. Because there was, and is, no federal question involved herein, and because the United States Circuit Court did not have jurisdiction.

The first two grounds of the motion may be considered together, since, if the judgment sought to be reviewed is that of the United States Circuit Court of Appeals, it cannot be the judgment of the United States Circuit Court. That it is the judgment of the United States Circuit Court of Appeals, and consequently that this appeal must be dismissed, has already been decided by this Court.

Board of Com. of Tippecanoe Co. vs. Lucas, 93 U. S. 108;

Mower vs. Fletcher, 114 U. S. 127;

Stewart vs. Salamon, 97 U. S. 361;

Kimpton vs. Jubilee Placer Min. Co. 22 Montana, 107.

No rule is better settled than that an appeal from a decree entered by the court below in accordance with the mandate of the appellate court cannot be maintained.

Aspen Mining & Smelting Co. vs. Billings, 150 U. S. 31; 14 Sup. Ct. Rep. 4.

See, also, to the same effect and as fully supporting the motion to dismiss, the following cases:

Bates' Federal Equity Practice, Sec. 841;

Merrill vs. National Bank, 78 Fed. 208;

Bissell Carpet-Sweeper Co. vs. Goshen Sweeper Co., 72 Fed. 545;

Central Trust Co. vs. Evans, 73 Fed. 562;

Texas & P. R. Co. vs. Anderson, 149 U. S. 235;

Re Sanford Fork & Tool Co., 160 U. S. 246; 16 Sup. Ct. Rep. 291.

There was an appeal to the United States Circuit Court of Appeals from the decision of the Circuit Court.

The United States Circuit Court of Appeals had authority to decide the case as presented to it.

Smith vs. Iron Works, 165 U. S. 518; 17 Sup. Ct. Rep. 407;

Mast, Foos & Co. vs. Stover Mfg. Co. 20 Sup. Ct. Rep. 708 at 712;

Castner vs. Coffman, 20 Sup. Ct. Rep. 842.

If the decision of the United States Circuit Court of Appeals was erroneous, then, under the appellant's view of this case, and under the statute, it would have had a right to appeal therefrom to this Court. The question of whether or not jurisdiction existed in the United States Circuit Court depended, not upon diverse citizenship, but upon whether or not a federal question was involved. In such a case the decision of the United States Circuit Court of Appeals is not final, in the sense that an appeal cannot be taken therefrom to this Court. The appellant here is contending that a federal question was involved, and that the United States Circuit Court had jurisdiction on that account. It needs no argument, therefore, to point out that unless an appeal was taken from the judgment of the United States Circuit Court of Appeals within the time allowed by the statute that said judgment became final.

Howard vs. United States, 22 Sup. Ct. Rep. 543, at 545-546.

Of course, we are not to be understood as saying that upon the case being brought in the state court

and tried therein, if there should arise in the trial of the case a federal question, necessary for decision and which should be decided by the state court, that any jurisdiction which this Court would have by appeal from the final judgment of the highest tribunal of the state would be destroyed. Whether or not there would be such an appeal is not a question involved in this case. We have, under the condition of the case, a final judgment of the Circuit Court of Appeals on the question of jurisdiction, unappealed from, and an attempt to review the same by the effort made in this case to bring it before this Court on the claim of an appeal from a final judgment of the Circuit Court.

The two grounds which we present for the dismissal of this appeal are amply supported by both reason and authority, and we therefore ask for its dismissal.

III.

The third ground of the motion is likewise well sustained. It will be observed, from a reading of the amended complaint (Record, page 1), that in so far as under the rule of good pleading the complainant attempts to state a cause of action, its allegations upon the following points are the only material or necessary ones:

First. That the complainant was a corporation.

Second. That the defendant Montana Ore Purchasing Company was a corporation.

Third. That the complainant was the owner and entitled to the possession of the premises described in the complaint.

Fourth. That the defendant without right entered into the same and extracted ores therefrom, without the consent of the complainant, and the value of the said ores.

Fifth. That the defendant was continuing and threatened to continue the extraction of such ores, and to repeat said entry; that the complainant had no means of knowing the amount or value of the ores which would be extracted, and would be obliged to bring a multiplicity of suits; and that the premises were valuable chiefly for the ores therein contained.

These allegations in nowise presented a federal question. It is shown by the complaint that the defendants were in the *possession* of the premises and engaged in mining ores. It is not alleged in the complaint *that the complainant was in possession,* and this presents at the outset the question of whether or not the Circuit Court had any jurisdiction. The action is claimed to be one in equity for an injunction. It is not alleged in the action at law that the complainant was in the possession. Did, then, the Circuit Court, upon the allegations of this amended complaint, have jurisdiction, or

did the fact that the defendants were in possession and that the plaintiff did not allege that it was in possession, deprive the Court of any jurisdiction which it otherwise might have had? It is quite a general rule with reference to actions brought on the equity side of the United States Circuit Court for the purpose of quieting title that they cannot be maintained unless the complainant is, at the time the action is brought, in the possession of the premises. This seems to be upon the theory that the complainant is seeking equitable relief. If the rule is to be applied in all actions in which the complainant seeks equitable relief—and it would seem in reason that it should be—then the Circuit Court did not have jurisdiction by reason of the fact that the complainant was not in possession, and that it did not allege in its complaint that it was in the possession of the premises. (The appellant, in its brief, p. 21, says that the case is, in effect, one to quiet title.)

We refer the Court on this point to the following authorities and the cases therein cited:

Cosmos Exploration Co. vs. Gray Eagle Co., 112 Fed. 4;

United States Min. Co. vs. Lawson, 115 Fed. 1005.

See also:

California Oil and Gas Co. vs. Miller, 96 Fed. 12.

There is no federal question involved in this case or shown by the complaint. If the Court upon examination finds that there is no federal question involved here, then this appeal should be dismissed, since it is necessary that it should be made to appear that there is a federal question involved before it can be concluded that it has any jurisdiction to entertain or consider the appeal. This is purely an action to recover damages for trespass of a portion of a mining claim in which the complaint fails to show any possession on the part of the complainant, and does show possession on the part of the defendants. So far as the complaint is concerned in its statement of a cause of action, it appears that any questions which might arise would be simply questions of fact, and this is true, even if the allegations contained in the complaint for the purpose of attempting to give the Court jurisdiction were proper to be considered.

California Oil & Gas Co. vs. Miller, 96 Fed. 12;

Dewey Mining Co. vs. Miller et al., 96 Fed. 1.

In *California Oil and Gas Co. vs. Miller, supra, p. 21,* it is said:

"Eliminating from the bill in the case at bar all allegations relative to the claims and contentions of the defendants, there remain only allegations of the sources of complainant's ownership; and it is manifest that these allegations alone do

not show any dispute between the parties as to the meaning of a federal law. Indeed, the simple statement by plaintiff of his claim can seldom present a federal question, for the reason that a dispute as to the meaning of a federal law, or in regard to any other matter, can arise only when there are conflicting claims of two or more parties, and not out of the mere presentation of the claim of one party."

The controversy must be a real and substantial one; a mere claim in words is not enough.

Lampasas vs. Bell, 21 Sup. Ct. Rep. 368;

Florida Central & P. R. Co. vs. Bell, 20 Sup. Ct. Rep. 399;

McCain vs. Des Moines, 19 Sup. Ct. Rep. 644.

In the suit to quiet title to a mining claim, the fact that the defendant claims under a location does not raise a federal question.

DeLamar's Nevada Gold Ming. Co. vs. Nesbitt, 20 Sup. Ct. Rep. 715.

Trespass on a mining claim does not present or involve a federal question.

Peabody Gold Mining Co. vs. Gold Hill Mng. Co., 97 Fed. 657;

Mining Co. vs. Kennedy, 84 Fed. 2 and 3.

The complaint in its statement of a cause of action must present a federal question.

Tennessee vs. Union & Planters' Bank, 152 U. S., 454;

Postal Telegraph Cable Co. vs. Alabama, 155 U. S. 482;

Oregon, etc., Ry. Co. vs. Skottowe, 162 U. S. 495;

Galveston, etc., Ry. Co. vs. Texas, 170 U. S. 226; 18 Sup. Ct. Rep. 603;

Florida Central & P. Ry. Co. vs. Bell, 20 Sup. Ct. Rep. 399-403.

The question of jurisdiction cannot be waived.

Mexican National R. Co. vs. Davidson, 15 Sup. Ct. Rep. 563.

A federal question is not involved so as to give the Circuit Court jurisdiction, because in the course of the litigation it may become necessary to give a construction to the Constitution or some law of the United States.

Wise vs. Nixon, 78 Fed. 203;

Water Co. vs. Keyes, 96 U. S., 199-203.

It must appear from plaintiffs' statement of his cause of action.

M. O. P. Co. vs. B. & M. Co. 93 Fed. 274;

Florida Central & P. R. Co. vs. Bell, 20 Sup. Ct. Rep. 399.

Abstract questions of law are not to be consid-

ered unless it appears from the statement of facts constituting the cause of action that they are such as to make them material and necessary for a decision of the case.

N. Y. L. E. & W. R. R. Co. vs. Madison, 123 U. S. 524.

A claim to land under a patent from the United States does not present a federal question.

Florida Cent. & P. R. Co. vs. Bell, 20 Sup. Ct. Rep. 399-402.

A suit brought in support of an adverse claim to a mine is not a suit involving the construction of the Constitution or any law of the United States.

Bushnell vs. Crooke Ming. & Smelting Co., 13 Sup. Ct. Rep. 771;

Shoshone Mining Co. vs. Rutter et al., 20 Sup. Ct. Rep. 726;

Blackburn vs. Portland Gold Mining Co., 20 Sup. Ct. Rep. 222.

It is thoroughly well settled by the foregoing authorities that it must appear from the plaintiff's own statement of his case that a federal question is involved. This must appear from a statement of the facts necessary to be set forth under the rules of good pleading in order to show a cause of action in favor of the plaintiff. It cannot be deduced from anything contained in the complaint, which

is not material to the plaintiff's cause of action. It is as thoroughly well settled that the plaintiff cannot anticipate the defense of the defendant, and by statements contained in his pleadings for that purpose present a federal question. In other words, he cannot create jurisdiction in the Circuit Court by anticipating the defendant's defense or alleging what the defendant claims, or will claim in the case. The decision of the United States Circuit Court of Appeals is to this effect; of itself it is entirely sufficient in its statement of argument, reason and authority to support the proposition. We refer the Court to it.

Montana Ore Purchasing Co. vs. Boston & Montana Con. Copper and Silver Mng. Co., 93 Fed. 274.

Since that decision was rendered this Court has had occasion to pass upon the question, and its opinion, which is in accord with the opinion of the Circuit Court of Appeals above mentioned, is determinative of this question.

Excelsior Wooden Pipe Co. vs. Pacific Bridge Co. 22 Sup. Ct. Rep. 681;

Florida Cent. & P. R. Co. vs. Bell, 20 Sup. Ct. Rep. 399.

See also:

Railroad Co. vs. Lewis, 172 U. S. 457; 19 Sup. Ct. Rep. 451;

Colorado Central Con. M. Co. vs. Turck, 150 U. S. 138;

Egan vs. Hart, 17 Sup. Ct. Rep. 300.

Now this Court cannot take jurisdiction of this case in face of that decision, but it would not claim jurisdiction for another reason. The United States Circuit Court of Appeals having determined the question, and no appeal having been taken from its decree, this Court will not, in the face of that adjudication and that fact, entertain jurisdiction of this appeal.

Robinson vs. Caldwell, 165 U. S. 359;

Carter vs. Roberts, 20 Sup. Ct. Rep. 713.

The appeal should have been taken from the judgment of the United States Circuit Court of Appeals.

Howard vs. United States for the use of Steward, 22 Sup. Ct. Rep. 543.

Again, where jurisdiction is shown by the complaint it may be taken away by the answer. It is made the duty of the United States courts to dismiss a case the moment it appears that the Court has no jurisdiction or that a federal question is not involved. The answer in this case shows clearly that there is no federal question involved. That where jurisdiction is shown by the complaint it may be taken away by the answer is a proposition thoroughly established by the decisions of this court, and these decisions also establish the

proposition that the defendant has a right to deny that he will claim or assert the things which the plaintiff charges he will claim, and the right to disclaim as to all such allegations contained in the complaint.

Robinson vs. Anderson, 121 U. S. 522;

Florida Cent. & P. R. Co. vs. Bell, 20 Sup. Ct. Rep. 399;

Excelsior Wooden Pipe Co. vs. Pacific Bridge Co., 22 Sup. Ct. Rep. 681;

M. O. P. Co. vs. B. & M. Co., 93 Fed. 274;

Railroad Co. vs. Lewis, 173 U. S. 457;

Colorado Central Con. M. Co. vs. Turck, 150 U. S. 138.

Where the complaint does not show that a federal question is involved and necessary for a decision of the case, it is equally well settled that a defense which may be interposed by pleading or evidence under a law of the United States will not confer jurisdiction.

Peabody Min. Co. vs. Mining Co. 111 Fed. 817-822, and cases cited;

Pratt et al. vs. Paris Gas Light & Coke Co., 18 Sup. Ct. Rep. 62, at 64;

And cases cited, supra.

What we have already said and the authorities which we have already cited are sufficient to dis-

pose of this case in favor of the motion to dismiss; but we beg to call the Court's attention to the further propositions:

1. That the complaint and the answer thereto raise only issues of fact and present no question of the construction of the Constitution or laws of the United States; and

2. That if it could be argued that any such question was involved, it has been decided by this Court, and after a decision of a question by this Court it is no longer a federal question.

On the first proposition it would seem to be sufficient to refer to the allegations of the complaint constituting plaintiff's cause of action, and to the answer thereto. Whether the plaintiff is the owner of the ground claimed by it and the defendant is the owner of the ground claimed by it, is a question of fact, whether defendant's possession was under a superior title or whether there is a vein which has its apex within the defendant's ground and which has and can be followed down into the plaintiffs' ground, also presents a question of fact, as does the location, character, extent and direction of the veins and ore bodies, and under the decision these questions of fact do not present any federal question.

Murray vs. Blue Bird Ming. Co. Ltd., 45 Fed. 385;

Blue Bird Mng. Co., Ltd., vs. Largey, 49 Fed. 289;

Foster vs. Kansas, 112 U. S. 201;

Dewey Ming. Co. vs. Miller, 96 Fed. 1;

California Oil & Gas. Co. vs. Miller, 96 Fed. 12, at p. 17;

Bushnell vs. Crooke M. & S. Co., 13 Sup. Ct. Rep. 771, and cases cited;

Water Co. vs. Keyes, 96 U. S. 199-203;

Wise vs. Nixon, 78 Fed. 203.

All questions which might possibly arise in the trial of the case have been determined by this Court and, therefore, even though any of such questions might arise, they would not present federal questions or give the Circuit Court jurisdiction. It is not apparent that there is, or was, any dispute between the parties as to the law, and therefore it is highly improbable that in the trial of the case any questions calling for the application of the laws of the United States would arise. We need not discuss this phase of the case, however, for the reason that no federal question is presented by the complaint. We are not to be understood as taking the position that the Court would have jurisdiction if a federal question was raised by the answer. The authorities above cited show that it would not have such jurisdiction, but assuming for the sake of the argument the possibility of a

claim of a federal question being presented, it could not give jurisdiction. Every question which could possibly arise under the issues made by the pleadings has been passed upon and determined by this Court in the following cases, and the cases therein cited:

Iron Silver Ming. Co. vs. Elgin, 118 U. S. 196;

Walrath vs. Champion Ming. Co., 18 Sup. Ct. Rep. 909;

Del Monte M. & M. Co. vs. Last Chance M. Co., 18 Sup. Ct. Rep. 895, and cases cited.

Clark vs. Fitzgerald, 18 Sup. Ct. Rep. 941.

In questions of trespass it seems to be quite well settled that one who enters beneath the surface of the mining claim of another is *prima facie* a trespasser and must justify his presence there. He, therefore, has the burden of proof and he must discharge it by presenting a state of facts which will entitle him to defeat the action. Now as the law has been declared by this Court with reference to mining claims and the rights of the parties whether or not he can justify will present only questions of fact.

Iron Silver Ming. Co. vs. Campbell, 17 Colo. 267;

Duggan vs. Davey, 4 Dak 110;

Leadville Ming. Co. vs. Fitzgerald, 4 Morris Ming. Reports, 380;

Doe vs. Waterloo, 54 Fed. 935.

All questions as to the construction of the law having been determined by this Court, no federal question exists.

Kansas vs. Bradley, 26 Fed. 289;

Blue Bird Ming. Co. vs. Largey, 49 Fed. 289;

Foster vs. Kansas, 112 U. S. 201.

The proper rule is that the case should be tried in the state court and that, if during the progress of the trial federal questions arise and are decided, an appeal should be prosecuted from the state court to the Supreme Court of the United States; it must be presumed in the first instance that the state court will properly declare the law of the United States and apply it.

New Orleans vs. Benjamin, 153 U. S. 411; 14 Sup. Ct. Rep. 905.

Upon the foregoing considerations and authorities the appeal should be dismissed with costs, and we pray the judgment of this Court that the same be done.

13758

IV.

ON THE MOTION TO AFFIRM AND ON THE MERITS.

ARGUMENT AND AUTHORITIES.

Little more attention need be given to the argument and authorities of the appellant than to restate the proposition that appellant's brief and argument is not founded upon or supported by the facts in the case, and that it proceeds upon assumptions which have no support in the record, and that the authorities cited have no application to the matters sought to be presented by this appeal. They certainly lend no support to the claim of appellant that the amended bill of complaint conferred jurisdiction upon the Circuit Court, and that, if it did disclose any jurisdiction, the defendants had no right to disclaim, or that that jurisdiction, so shown upon the face of the complaint, could not be defeated or taken away by the answer.

We need not cite to the Court the authorities in support of the proposition that the jurisdiction of the United States Court is limited, and that the more recent statutes passed with reference to its jurisdiction had the purpose of circumscribing and

limiting it; a reading of the decisions of this Court to which we have already referred in support of the motion to dismiss will disclose a construction of these statutes as bearing upon this subject.

The argument and authorities which we have already presented in support of the motion to dismiss are hereby respectfully referred to in support of the motion to affirm, in the event the Court shall come to a consideration of that motion, or a determination of the merits of this appeal. *They will be found amply sufficient to justify the affirmance which we pray.*

We may be permitted, however, to refer briefly to some of the matters stated by appellant in argument, but if we were to refer to them in particular, it would be only a repetition of what we have already set forth. The Court will perceive that every allegation contained in the amended complaint, and upon which the appellant relies to show a federal question, has been disclaimed by the appellees. It seems to be conceded that the decision of the United States Circuit Court of Appeals made upon the original complaint and reported in the 85th Federal Reporter, at page 867, was and is correct. The contention is made that the allegations which were added to the amended bill brought it within the suggestion made by the Circuit Court of Appeals in that case that there might be a federal question involved if properly

pleaded. *That they did not do so, however, is attested by the decision of the same court, reported in the 93rd Federal Reporter, at page 274.* Of course, appellant's counsel say nothing in their brief about this decision. They seem to evince an ill-natured disposition about the case, and offer some criticism of the answer of the appellees. Their idea expressed in the brief seems to be that because appellant brought this action in the United States Circuit Court,and because of that fact alone, that Court had jurisdiction, and that the appellees are very greatly to be blamed for having questioned its jurisdiction and thereby preventing the appellant from having the case tried there. The character of the remarks indulged in by counsel for appellant neither call for nor would justify us in attempting to make a reply in kind. This much only we will say on the subject: That if the Circuit Court did not have jurisdiction, it certainly could not claim any authority over the parties, to supervise or control their actions or conduct with reference to the subject-matter of the action in a case which might be brought in the state court. With such a case it would not and could not have any proper concern, and it would be a reflection upon its dignity and integrity to assume that it would feel or manifest any interest therein, either with reference to the character of the complaint which might be filed, or to the defenses which might be interposed thereto, or to

the result or determination which might follow.

On page 12 of the brief counsel refer to a case decided by the Supreme Court of the State of Montana, and follows the reference by claims as to what the Court said in such case, and as to the argument of counsel, as though they were appealing from that decision to this Court. We must express our inability to perceive any relevancy of this matter, or any justification for its attempted intrusion into this case. That it is not in the record ought to have been a sufficient reason to persuade counsel from making the references.

On page 13, paragraph "d," another reference is made to a case said to be pending. We must disclaim knowledge of this case or of any justification for its insertion in the brief.

Paragraph "e," on said page, is also a misstatement, as is likewise paragraph "f."

The claims which counsel assert are made, following these references, are best disposed of by a reference to the answer in the case, which shows that counsel are altogether mistaken. The Rarus claim, or the Rarus patent, is in nowise involved in this case, but if it were, it would not present a federal question. This Court would not occupy its time with considering a question which it had already determined, and if it did, it would not do so further than to affirm a judgment or decision which was made in compliance with it.

The fact that the decision of the Circuit Court

or of the United States Circuit Court of Appeals was made before or after the decision by this Court could make no difference. The decision in the case of *Del Monte Mining & Milling Co. vs. Last Chance Mining Co., 171 U. S. 55,* was rendered on May 23rd, 1898; the decision of the United States Circuit Court of Appeals was made in this case on February 13th, 1899.

The appellees did not claim to own any portion of the ground by virtue of the Rarus patent, or any other rights than those conferred by the patent from the United States for that portion of the Johnstown lode claim claimed by them. There was no question of the construction of these patents involved; the answer shows that the reliance of the defendants was upon the rights acquired from the Johnstown patent, and confined to the rights of the Johnstown claim as patented, and to such rights as proceeded therefrom to the parcel of ground claimed by them. Neither was there any question involving the right of a vein having a divided apex. The defendants claimed the entire apex in their portion of the ground, and set forth a disclaimer of the claim which the plaintiff asserted they would make with reference to a vein crossing the side line, or being divided by the side line. So that, taking the complaint in the first instance, in its statement of a cause of action, it presented no federal question, and it comes squarely within the authorities which hold that unless the

complaint, in its statement of a cause of action, presents a federal question, the Court has no jurisdiction.

The only grievance complained of is that the defendants entered within the portion of the ground claimed by the plaintiff and mined, took away and converted to their own use ores and minerals therefrom. Appellants say, on page 21 of the brief, that it is, in effect, an action to *quiet its title.* Taking this statement as correct, then the complainant did not give the Court jurisdiction, for the reason that the complainant did not allege possession, and did not present any question for the construction of a law of the United States. We need only refer on this point to the authorities which we have already cited, and repeat again that this statement of the complaint could only present questions of fact.

None of the authorities referred to in the first division of appellant's argument need be noticed, except the cases of *Walla Walla vs. Walla Walla Water Co., 172 U. S. 1,* and *Cox vs. Gilmer, 88 Fed. 343* A reference to these cases will show that it was necessary, in the statement of plaintiff's cause of action, to disclose the existence of a federal question, and that it was so disclosed. Without the statement from which the federal question arose, the plaintiff's complaint in these actions would have been a mere blank and would not have

stated any cause of action whatever. No argument is necessary to point this out, as it appears from the plain statements of the Court in the opinions themselves. They have, however, not the slightest application to the case here presented. A comparison of them with the facts in this case and with the decisions which we have cited in support of the motion to dismiss will at once dispose of any question of their applicability here and must inevitably lead to the conclusion that the Circuit Court did not have jurisdiction.

A motion to affirm will be sustained if the dismissal of the bill for want of jurisdiction was correct.

Bienville Water Supply Co. vs. Mobile, 20 Sup. Ct. Rep. 40.

V.

The second division of appellant's brief in the discussion of the contention, that a federal question being presented by the complaint cannot be eliminated by the defendants' answer, has been disposed of by the authorities which we have heretofore cited. Of course, no federal question was presented by the bill of complaint in this case, but had there been such a question presented the answer of the defendants would have divested the case of any such question. The appellant has been

quite unhappy in the selection of cases, and in the argument presented in this part of the brief. A glance at the cases cited will show their entire inapplicability. In answer to this portion of appellant's brief we may safely rely upon the following authorities, which have already been cited:

California Oil & Gas Co. vs. Miller, 96 Fed. 12;

Lampasas vs. Bell, 21 Sup. Ct. Rep. 368;

Florida Cent. & P. R. Co. vs. Bell, 20 Sup. Ct. Rep. 399;

Wise vs. Nixon, 78 Fed. 203;

M. O. P. Co. vs. B. & M. Co., 93 Fed. 274;

Bushnell vs. Crooke Ming. & Smelting Co., 13 Sup. Ct. Rep. 771;

Shoshone Ming. Co. vs. Rutter et al., 20 Sup. Ct. Rep. 726;

Blackburn vs. Portland Gold Ming. Co., 20 Sup. Ct. Rep. 222;

Excelsior Wooden Pipe Co. vs. Pacific Bridge Co., 22 Sup. Ct. Rep. 681;

R. R. Co. vs. Lewis, 172 U. S. 457; 19 Sup. Ct. Rep. 451;

Colorado Cent. Con. Ming. Co. vs. Turck, 150 U. S. 138;

Egan vs. Hart, 17 Sup. Ct. Rep. 300;

Robinson vs. Anderson, 121 U. S. 522;

Peabody Ming. Co. vs. Mining Co., 111 Fed. 817; 822 and cases cited;

Pratt et al. vs. Paris Gaslight & Coke Co., 18 Sup. Ct. Rep. 62, at p. 905.

In *Excelsior Wooden Pipe Co. vs. Pacific Bridge Co., supra,* this Court sayeth:

"While it seems reasonable to say that a jurisdiction once acquired by the filing of a proper bill ought not to be taken away by any subsequent pleading, the statute is peremptory in this particular and requires the Court to dismiss the case whenever *at any time* it shall appear that its jurisdiction has been improperly invoked. We are by no means without authority upon this question."

Then the Court cites and approves:

Robinson vs. Anderson, 121 U. S. 522.

No argument upon the authorities which we have cited is necessary, as they are conclusive upon all propositions advanced by the appellant against the contention made by it. The appellant presented the same argument as contained in its brief to the Circuit Court of Appeals, and it received the answer of that Court contained in its decision reported in *93 Fed. 274.*

We are entirely satisfied with that answer and submit to this Court that it is absolutely correct.

We, therefore, respectfully submit that if this

Court shall come to a consideration of the merits of this appeal it should enter its order or decree herein affirming the decree dismissing the action.

JOHN J. McHATTON,
JOHN W. COTTER,
Attorneys for Appellees.